



No. 14973

United States
Court of Appeals
for the Ninth Circuit

CLARENCE V. WATSON, Appellant,
vs.
WOODROW C. BUTTON, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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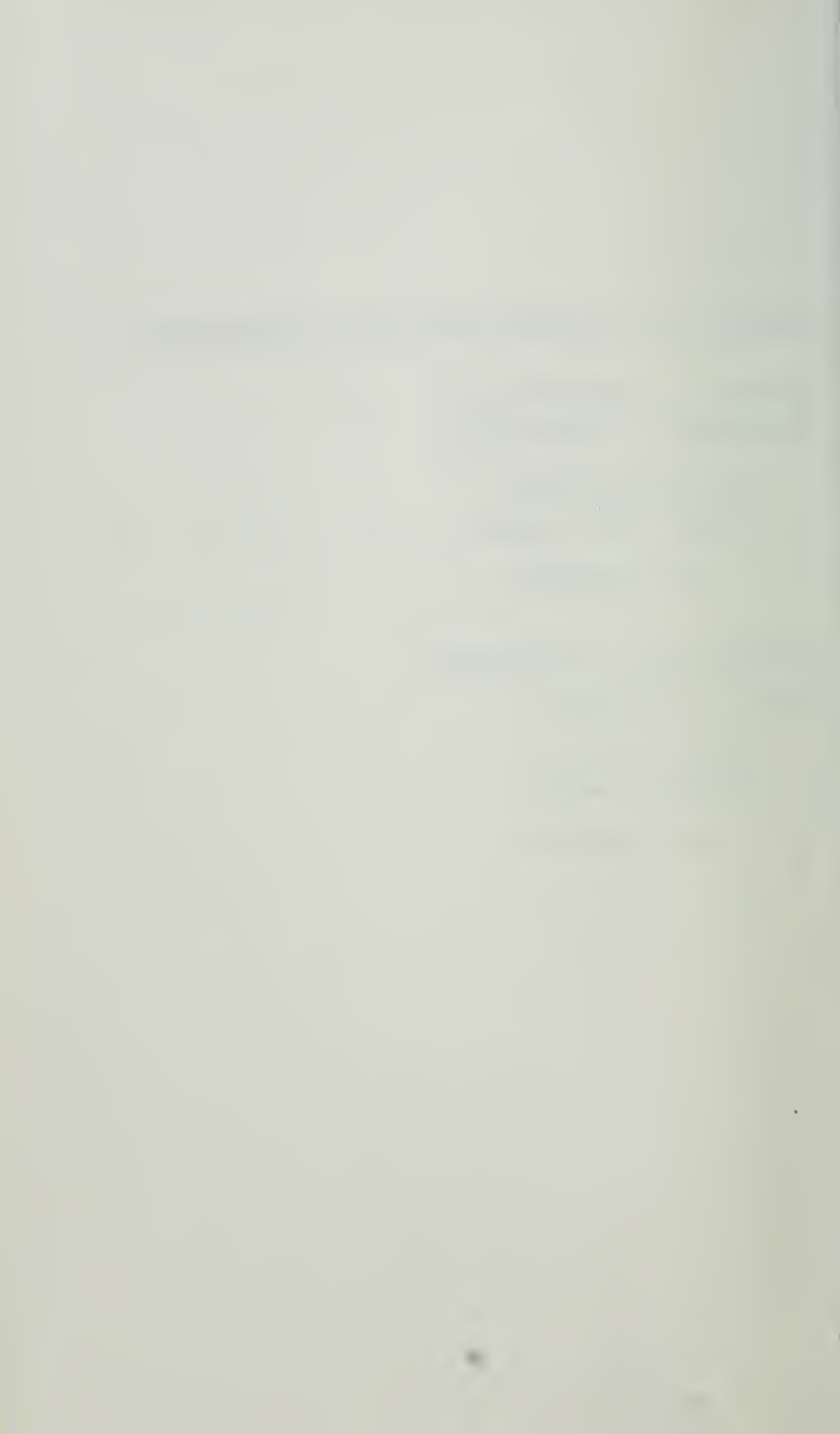
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In the District Court of the United States for the
District of Oregon

No. 7686-Civil

WOODROW C. BUTTON, Plaintiff,

vs.

CLARENCE V. WATSON, Defendant.

COMPLAINT

Comes now the plaintiff and for his first cause of suit against the defendant complains and alleges as follows:

I.

Plaintiff is a citizen, resident and inhabitant of the State of Washington and defendant is a citizen, resident and inhabitant of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

That on May 29, 1951, plaintiff and defendant purchased all of the stock of Highway Freight, Inc., an Oregon corporation, engaged in the business of a motor carrier for hire.

III.

That 49 $\frac{1}{2}$ shares of stock of said corporation were issued to plaintiff and 49 $\frac{1}{2}$ shares of stock of said corporation were issued to defendant and 1 share of stock of said corporation was issued to Earle V. White, Jr., who had no beneficial interest in said corporation.

IV.

That at a special meeting of the stockholders of said corporation upon May 29, 1951, plaintiff and defendant and Earle V. White, Jr., were duly elected directors of said corporation.

V.

That at a meeting of the board of directors of said corporation on May 29, 1951, defendant was duly elected president-treasurer of said corporation with the duties of general manager and with the full time care of the general business matters of the corporation.

VI.

That from May 29, 1951, until July 20, 1954, defendant was the duly elected and qualified president-treasurer of said corporation with the duties of general manager and with the full time care of the general business matters of said corporation.

VII.

That defendant in the full time conduct of the general business matters of said corporation owed a fiduciary duty to plaintiff.

VIII.

That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as part of the sale, the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation.

IX.

That defendant during the period May 29, 1951, until July 20, 1954, misappropriated the funds of said corporation. That some of the instances of said misappropriation are as follows:

During the period December 1, 1953, through June 15, 1954, there was \$183.75 cash recorded as received by Highway Freight, Inc., but not deposited in the bank account of the corporation. The dates, amounts and payors are as follows:

January 20, 1954; amount \$30.00; payor A. E. Lehman.

February 1, 1954; amount \$5.00; payor Les Boyd.

March 20, 1954; amount \$50.00; payor L. M. Boyd.

April 5, 1954; amount \$23.75; payor Unknown.

April 15, 1954; amount \$75.00; payor Portland Equipment Co.

Total amount \$183.75.

During the period December 1, 1953, through June 15, 1954, there were checks in the amount of \$2,990.32 recorded as received by Highway Freight, Inc. but not deposited. The dates and amounts and payors of these checks are as follows:

December 18, 1953; amount \$192.85; payor Park Leading Company.

February 23, 1954; amount \$157.03; payor Park Lumber Co.

March 2, 1954; amount \$297.19; payor Park Lumber Co.

March 23, 1954; amount \$28.43; payor A. Fisher.

March 16, 1954; amount \$398.74; payor Park Lumber Co.

March 11, 1954; amount \$95.35; payor Granning and Treese.

April 11, 1954; amount \$43.03; payor Jack Harbert.

April 12, 1954; amount \$72.50; payor Park Lumber Co.

April 7, 1954; amount \$117.44; payor Granning and Treese.

May 18, 1954; amount \$50.00; payor Tom Dunbar.

June 3, 1954; amount \$110.00; payor Tom Dunbar.

June 7, 1954; amount \$102.38; payor Tom Dunbar.

March 3, 1954; amount \$70.04; payor H. R. Lee.

April 30, 1954; amount \$387.28; payor Park Lumber Co.

May 21, 1954; amount \$166.78; payor Lighthall and M.

June 7, 1954; amount \$422.27; payor D. Knapp.

June 7, 1954; amount \$107.72; payor M. & M. Logging Co.

June; amount \$171.39; payor Composition unknown.

These checks were marked in the books as being taken by defendant, although there is no record of such amounts in the drawing account of the defendant.

X.

That plaintiff believes that an accounting would

reveal numerous other instances of misappropriation by the defendant.

XI.

That plaintiff does not know the amount of money by which defendant damaged plaintiff through his misappropriation, but plaintiff believes that it is in excess of \$5,000.00.

XII.

That plaintiff discovered through investigation the misappropriation hereinbefore alleged after July 20, 1954.

XIII.

That plaintiff and defendant are now jointly responsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, in the amount of approximately \$65,000.00, and plaintiff alleges that part of these liabilities are due to the misappropriations of the defendant.

XIV.

That plaintiff has no speedy or adequate remedy at law.

For a second cause of suit against the defendant, plaintiff complains and alleges as follows:

I.

Plaintiff realleges all of the allegations contained in Paragraphs I through VIII of his first cause of suit and incorporates them with the same effect as if they had been fully set forth herein.

II.

That defendant during the period May 29, 1951, until July 20, 1954, mismanaged the affairs of Highway Freight, Inc. through willful neglect or gross negligence. That some of the instances of said mismanagement are as follows:

1. Permitting 10% per month penalty to accumulate on unpaid Oregon State Highway taxes and thereby constantly putting the corporation's Oregon Public Utilities Commission permit in constant jeopardy.

2. Permitting State of Washington Public Utilities Commission taxes to accumulate unpaid.

3. Permitting Federal Withholding taxes to accumulate unpaid.

4. Permitting State of Oregon Withholding taxes to accumulate unpaid.

5. Permitting Federal Old Age Benefit taxes to accumulate unpaid.

6. Permitting Federal Excise taxes to accumulate unpaid.

7. Permitting Federal Transportation taxes to accumulate unpaid.

8. Permitting State of Oregon Industrial Accident taxes to accumulate unpaid.

9. Permitting State of Oregon Unemployment taxes to accumulate unpaid.

10. Permitting Highway Freight, Inc. rig to be executed upon and kept off the road and out of productive use for at least a week upon a judg-

ment being obtained by Butlers Tire & Battery Co., Inc.

11. Turning current accounts receivable over to employees to collect to pay their own salaries thus harming the good will of Highway Freight, Inc.

12. Losing valuable and lucrative interchange rights with Okey's Trucking of Woodland, Washington, due to refusal to pay to Okey's Trucking its share of interchange business, refusal to keep proper books on interchange business and accepting of payments in the name of Highway Freight that should have been in the name of Okey's Trucking.

III.

That plaintiff believes that an accounting would reveal numerous other instances of mismanagement by the defendant.

IV.

That plaintiff does not know the amount of money by which defendant damaged plaintiff through his mismanagement, but plaintiff believes that it is in excess of \$5,000.00.

V.

That plaintiff discovered through investigation the mismanagement hereinbefore alleged after July 20, 1954.

VI.

That plaintiff and defendant are now jointly re-

sponsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, in the amount of approximately \$65,000.00, and plaintiff alleges that part of these liabilities are due to the mismanagement of the defendant.

VII.

That plaintiff has no speedy or adequate remedy at law.

For a third cause of suit against the defendant, plaintiff complains and alleges as follows:

I.

Plaintiff realleges all of the allegations contained in Paragraphs I through VIII of his first cause of suit and incorporates them with the same effect as if they had been fully set forth herein.

II.

That defendant during the period May 29, 1951, until July 20, 1954, diverted corporate opportunities of Highway Freight, Inc. away from the corporation and to himself. That some of the instances of said diversion of corporate opportunities are as follows:

That for almost two years up to July 20, 1954, defendant personally has done motor carrier hauling for Park Lumber Co. of Estacada, Oregon. That said hauling has often been done with Highway Freight, Inc. vehicles and other equipment.

That defendant has informed plaintiff and plaintiff therefore believes that defendant cancelled an account receivable of Highway Freight, Inc. in return for a certain Diamond Tractor; that, thereafter, for many months previous to July 20, 1954, defendant proceeded to use said Diamond T Tractor for hauling, using other Highway Freight equipment and personnel to service said Diamond T Tractor and taking as his personal money all of the revenues obtained through the use of said Diamond T Tractor.

III.

That plaintiff believes that an accounting would reveal numerous other instances of diversion of corporate opportunities.

IV.

That plaintiff does not know the amount of money by which defendant damaged plaintiff through his diversion of corporate opportunities, but plaintiff believes that it is in excess of \$5,000.00.

V.

That plaintiff discovered through investigation the diversion of corporate opportunities hereinbefore alleged after July 20, 1954.

VI.

That plaintiff and defendant are now jointly responsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, in the amount of approximately \$65,000.00, and plaintiff

alleges that part of these liabilities are due to the diversion of corporate opportunities by the defendant.

VII.

That plaintiff has no speedy or adequate remedy at law.

Wherefore, plaintiff prays for a judgment against the defendant as follows:

1. For an accounting of all sums due to plaintiff on account of defendant's misappropriation of the funds of Highway Freight, Inc.

2. For an accounting of all sums due to plaintiff on account of defendant's mismanagement of the affairs of Highway Freight, Inc. through willful neglect or gross negligence.

3. For an accounting of all of the sums due to plaintiff on account of defendant's diversion of corporate opportunities of Highway Freight, Inc. to himself.

4. For a judgment for such amounts so found to be due the plaintiff from the defendant.

5. For costs of suit.

6. For such other and further relief as to the Court may seem just and equitable.

CRAWFORD & WILLNER,

/s/ By DON S. WILLNER,

Of Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed Sept. 13, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

(In Equity)

The defendant moves the court as follows, and each as a separate instance:

(1) To dismiss the suit for the reason that it appears on the face of the complaint herein that said complaint fails to state a claim against defendant upon which relief can be granted.

(2) To dismiss the suit for the reason that it appears on the face of the complaint herein that Highway Freight, Inc. is an indispensable party to this suit and has not been made a party to said complaint. The reason why Highway Freight, Inc. is an indispensable party is as follows: That in Paragraph VIII of plaintiff's first cause of suit, and which is re-alleged and re-affirmed in each succeeding cause, plaintiff has alleged "That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as part of the sale, the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation."

(3) To dismiss the suit for the reason that it appears on the face of the complaint herein that Earle V. White, Jr. is an indispensable party to this suit and has not been made a party to said complaint. The reason why Earle V. White, Jr. is an indispensable party is as follows: That in Para-

graph III of plaintiff's first cause of suit, and which is re-alleged and re-affirmed in each succeeding cause, plaintiff has alleged "That 49½ shares of stock of said corporation were issued to plaintiff and 49½ shares of stock of said corporation were issued to defendant and 1 share of stock of said corporation was issued to Earle V. White, Jr., who had no beneficial interest in said corporation."

/s/ HARRY A. HARRIS,
Attorney for Defendant

To: Don S. Willner, of Attorneys for Plaintiff.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at the United States Court House, City of Portland, Oregon, on the 18th day of October, 1954, at the hour of 10:00 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ HARRY A. HARRIS,
Attorney for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

October 18, 1954

Plaintiff appearing by Mr. Don S. Willner, of counsel, and the defendant by Mr. Harry A. Harris,

of counsel. Whereupon, this cause comes on to be heard upon the motion of the defendant to dismiss this cause, and the Court having heard the arguments of counsel, reserves its decision.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits Paragraphs I, II, III, IV, V, VI and VIII of plaintiff's first cause of suit.

II.

Denies Paragraphs VII, XII and XIII of Plaintiff's first cause of suit, and each and every allegation, matter and thing therein contained, and the whole thereof.

III.

Answering Paragraph IX of plaintiff's first cause of suit, defendant denies misappropriating funds of said corporation between the dates alleged or at any other time, and as to the remaining allegations contained in Paragraph IX, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth or falsity of said averments and therefore denies the same.

IV.

Answering Paragraph X of plaintiff's first cause

of suit, defendant denies that an accounting would reveal any misappropriation in this instance or any other instances.

V.

Answering Paragraph XI of plaintiff's first cause of suit, defendant denies the same and each and every allegation, matter and thing therein contained and the whole thereof, and denies specifically that defendant has misappropriated any sum of money whatsoever.

Comes now defendant and for answer to plaintiff's second cause of suit, denies, admits and alleges as follows:

I.

Re-affirms Paragraphs I, II, III, IV and V of defendant's answer to plaintiff's first cause of suit and incorporates the same with the same effect as though fully set forth herein.

II.

Answering Paragraph II of plaintiff's second cause of suit, defendant denies that he mismanaged the affairs of Highway Freight, Inc. through willful neglect or gross negligence or in any other manner between the periods therein alleged or at any other time.

Further answering Sub-paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Paragraph II of plaintiff's second cause of suit, defendant admits that during the period he was manager of the corporation that penalties accumulated on unpaid Oregon State

Highway taxes; that the Oregon Public Utilities Commission permit was in jeopardy; that State of Washington Public Utilities Commission taxes; Federal Withholding Taxes; State of Oregon Withholding Taxes; Federal Old Age Benefit Taxes; Federal Excise Taxes; Federal Transportation Taxes; State of Oregon Industrial Accident Taxes; State of Oregon Unemployment Taxes; and a judgment in favor of Butlers Tire & Battery Co., Inc. were for a period unpaid; and that defendant turned current accounts receivable over to employees to collect to pay their own salaries, all without fault or neglect on the part of defendant.

Answering Sub-paragraph 12 of Paragraph II of plaintiff's second cause of suit, defendant denies the same, and each and every allegation, matter and thing therein contained and the whole thereof.

III.

Answering Paragraph III of plaintiff's second cause of suit, defendant denies that an accounting would reveal any mismanagement in this instance or any other instance.

IV.

Answering Paragraph IV of plaintiff's second cause of suit, defendant denies any mismanagement on the part of defendant in any manner whatsoever, and specifically denies that plaintiff was damaged in the sum of \$5,000.00 or in any other sum.

V.

Answering Paragraph V of plaintiff's second

cause of suit, defendant denies any mismanagement on the part of defendant at any time or at all.

VI.

Denies Paragraphs VI and VII of plaintiff's second cause of suit, and each and every allegation, matter and thing therein contained and the whole thereof.

Comes now defendant and for answer to plaintiff's third cause of suit, denies, admits and alleges as follows:

I.

Re-affirms Paragraphs I, II, III, IV and V of defendant's answer to plaintiff's first cause of suit, and incorporates the same with the same effect as though fully set forth herein.

II.

Answering Paragraph II of plaintiff's third cause of suit, defendant denies that he diverted corporate opportunities of Highway Freight, Inc. away from the corporation and to himself or to anyone else during the periods therein alleged or at any other time or at all.

Further answering Paragraph II of plaintiff's third cause of suit, defendant alleges that he did no personal motor carrier hauling for Park Lumber Company of Estacada, Oregon, during the period between May 29, 1951 and June 15, 1954, while defendant was performing the duties as manager of Highway Freight, Inc.

Further answering Paragraph II of plaintiff's

third cause of suit, defendant, as a portion of the consideration for a certain Diamond T Tractor, acquired in December, 1953, and believed to be one and the same as that contended for by plaintiff, cancelled an account receivable in the amount of \$696.66 of Highway Freight, Inc. from one John McCracken, which amount was credited against defendant's delinquent salary account then due, owing and unpaid from said corporation to defendant. That thereafter defendant caused said Diamond T Tractor to be used when no other Highway Freight, Inc. equipment was available, and all charges of maintenance and operation of said Diamond T Tractor were charged against the earnings of said Tractor prior to distributing its earnings to defendant, and such is reflected in the books and accounts of Highway Freight, Inc.

III.

Answering Paragraph III of plaintiff's third cause of suit, defendant denies any diversion of corporate opportunities by defendant in this instance or any other instance.

IV.

Answering Paragraph IV of plaintiff's third cause of suit, defendant denies that defendant diverted any corporate opportunities and that plaintiff was damaged in the sum of \$5,000.00 or in any other sum.

V.

That defendant denies that defendant diverted any corporate opportunities at any time.

VI.

Denies Paragraphs VI and VII of plaintiff's third cause of suit, and each and every allegation, matter and thing therein contained and the whole thereof.

VII.

Further answering plaintiff's complaint, defendant denies each and every allegation, matter and thing contained in plaintiff's complaint not herein admitted, contraverted, modified, qualified or specifically denied.

Comes now defendant and for a first, separate and distinct affirmative defense, alleges:

I.

That arising upon the face of the complaint herein, the facts alleged in said complaint are insufficient to state a claim upon which relief can be granted to plaintiff.

Comes now defendant and for a second, separate and distinct affirmative defense, alleges:

I.

That plaintiff during the time defendant was manager of Highway Freight, Inc. acted inequitably in respect to defendant and Highway Freight, Inc. as follows:

1. Drew a salary of \$500.00 per month from June 1, 1951 until February, 1952, and thereafter the sum of \$285.00 per month until August, 1953, from Highway Freight, Inc., while performing no services whatsoever for said corporation, and that during these periods the corporation reflected losses on its financial statements.

2. That plaintiff, who is also Vice-President of the Woodland State Bank, of Woodland, Washington, wherein the corporate bank accounts were kept; used his capacity in said bank to commit the following acts:

(a) Withdrew the sum of \$2,000.00 from the corporate bank account and applied it on a note owing from the corporation to said bank, which act caused checks to return for want of sufficient funds; thereby damaging the credit of Highway Freight, Inc., and causing many of the instances alleged as mismanagement in Paragraph II of plaintiff's second cause of suit in plaintiff's complaint on file herein.

(b) Collected money due Highway Freight, Inc., from Okey's Trucking of Woodland, Washington and converted the same to his own use and benefit.

(c) Withdrew the sum of \$200.00 from the personal account of defendant's wife for the payment of a note on a car without authorization from defendant or defendant's wife.

(d) Refused to allow defendant to pay wages to employees of Highway Freight, Inc. thus necessitating assigning accounts receivable to them.

3. Defendant is informed, believes and therefore alleges that plaintiff induced defendant while defendant was manager of the corporation to purchase two Mack Diesel Truck and Trailer units to haul lumber from a mill in which plaintiff had an interest at Gold Beach, Oregon, to Los Angeles, California, when said mill was in financial difficulty, and was forced to close down within ninety days, and that this was done for the purpose of sacrificing a lesser interest owned by plaintiff in Highway Freight, Inc. for a greater interest owned by plaintiff in said mill, by way of enhancing the sale value thereof.

4. That plaintiff constantly refused to give defendant the benefit of his advice upon various matters pertinent and necessary to the operation of Highway Freight, Inc., as a corporation, although defendant often requested the same.

II.

That by reason of the foregoing, plaintiff can not now be heard to complain of defendant before this honorable Court of Equity.

Comes now defendant and for a third, separate and distinct affirmative defense, alleges:

I.

That subsequent to the 1st day of January, 1954, a controversy existed between plaintiff and defendant over the defendant's methods of operating Highway Freight, Inc., an Oregon Corporation, or-

ganized and existing under and by virtue of the laws of the State of Oregon, principally owned by plaintiff and defendant, who were then the owners and holders of 49½ shares each of the capital stock of said corporation.

II.

That as a culmination of the controversy aforesaid, defendant on or about the 15th day of June, 1954, was removed as manager of said corporation.

III.

That thereafter and on or about the 20th day of July, 1954, and with full knowledge of all the facts, plaintiff and defendant entered into an agreement wherein plaintiff and defendant sold their interest and capital stock in Highway Freight, Inc. to Gilbert Kaer and Okey Hamrick, who are now the owners and holders of the beneficial shares of stock in said corporation. That as a portion of the consideration of said transfer, plaintiff and defendant agreed that Highway Freight, Inc., acting by and through its newly elected directors, would execute a full release from said corporation, to defendant, from any and all claims and demands of any kind existing against them or any of them in favor of the corporation.

IV.

That simultaneously with the transfer of the interest and capital stock as aforesaid, plaintiff entered into a collateral agreement wherein for and in consideration of defendant's transferring to

plaintiff a Diamond T Tractor and giving plaintiff authority to receive all monies due and owing to Highway Freight, Inc. on the accounts receivable and to disburse the funds and apply them on the accounts payable, plaintiff promised defendant to save defendant harmless on any and all liabilities thereafter arising against defendant in regard to defendant's operation of said corporation, and to pay to defendant the sum of \$3,000.00, said sum being evidenced by a promissory note, more particularly described in defendant's fourth, separate and distinct affirmative defense by way of counter-claim, and that by reason of the premises the matters complained of in plaintiff's complaint on file herein have been fully compromised and settled.

Comes now defendant and for a fourth, separate and distinct affirmative defense by way of counter-claim, alleges:

I.

That on or about the 20th day of July, 1954, for good and valuable consideration, plaintiff made, executed and delivered to defendant his said promissory note in writing in words and figures as follows, to-wit:

\$3,000.00

Portland, Oregon, July 20, 1954

For Value Received, I promise to pay to the order of Clarence V. Watson, at Portland, Oregon, Three Thousand (\$3,000.00) Dollars in lawful money of the United States of America, with interest thereon

in like lawful money at the rate of Five (5) Per Cent per annum, from date until paid, payable in monthly installments, at the dates and in the amounts as follows:

One Hundred (\$100.00) Dollars per month, which includes principal and interest, on or before the 20th day of July, 1954, and a like amount on or before the 20th day of each succeeding calendar month thereafter until both principal and interest have been paid;

Such monthly payments conditioned upon the maker receiving on or before the 15th day of the same month the above payments fall due, not less than Seven Hundred Fifty (\$750.00) Dollars from Messrs. Okey Hamrick and Gilbert Kaer as their monthly payments on a contract of July 2, 1954, for the purchase of the stock of Highway Freight, Inc.; and in the event of the failure of the maker hereof to receive said monthly payment as due from Messrs. Kaer and Hamrick, the aforesaid payment of \$100.00 per month due under this note will be delayed until such payment has been received from Messrs. Kaer and Hamrick, or one of them.

Therefore, if under the above conditions, said installments are not so paid, it is understood that the whole sum of both principal and interest do not become immediately due and collectible at the holder's option, but only become due and payable and collectible by the holder at his option in the event that the maker hereof has received the aforesaid monthly payment of not less than \$750.00

from Messrs. Kaer and Hamrick, and fails to make the payment of \$100.00 per month specified above. In case suit or action is instituted to collect this note or any portion thereof, I promise to pay such reasonable sum as the court may adjudge to be reasonable attorneys fees in such suit or action.

/s/ W. C. Button

Woodrow C. Button

II.

That the maker has received on or before the 15th day of the month when the above payments fall due his payments from Messrs. Kaer and Hamrick, as provided for in said note, and that demand has been made upon the plaintiff for the payment of said note, and the same has been refused, and there is now due, owing and unpaid on account thereof the sum of \$3,000.00, together with interest thereon at the rate of 5 per cent per annum from the 20th day of July, 1954, until paid, and that defendant does now exercise his option and declare the whole sum now due and payable.

III.

That said note provides, among other things, in case suit or action is instituted to collect this note, or any portion thereof, plaintiff promised and agreed to pay in addition to the costs and disbursements provided by statute such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action, and that \$450.00

is a reasonable sum to be allowed defendant as attorney's fees for the collection of this note.

Wherefore, Defendant having fully answered plaintiff's complaint, prays that said complaint be dismissed and that defendant be given judgment on his counter-claim in the sum of \$3,000.00, together with interest thereon at the rate of 5 per cent per annum from the 20th day of July, 1954 until paid; for the further sum of \$450.00 reasonable attorney's fees and for his costs and disbursements incurred herein.

/s/ STANLEY J. MITCHELL,

/s/ HARRY A. HARRIS,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed November 1, 1954.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for reply to the defendant's counterclaim on file herein alleges as follows:

I.

That plaintiff signed the promissory note set forth in defendant's counterclaim due to the fraudulent misrepresentation of the defendant in that plaintiff would not have signed this note but for the

defendant's concealing the facts that he had misappropriated the money of Highway Freight Co., grossly mis-managed its affairs and diverted its corporate opportunities to himself, all as alleged in plaintiff's complaint.

II.

That said concealment was done willfully and knowingly by defendant with the intent that plaintiff should sign said note.

III.

That at the time plaintiff signed said note, he did not have knowledge of defendant's misappropriation, gross mismanagement and diversion of corporate opportunities.

IV.

That plaintiff signed this note in reliance on the fraudulent concealment and misrepresentations of the defendant.

V.

That plaintiff had a right to rely on the misrepresentation and fraudulent concealment of the defendant since defendant was the President of the company and in general charge of all its business matters, and was in charge of all books and records of said corporation.

VI.

That as a direct and proximate result of the misrepresentation of the defendant, plaintiff has been injured in the sum of \$3,000.00, the value of said promissory note.

Wherefore, plaintiff prays that an order of this Court issue:

1. Denying defendant the relief prayed for in his counterclaim.
2. Cancelling said promissory note on the grounds of fraud.
3. For such other and further relief as to the Court may seem just and equitable.

CRAWFORD & WILLNER,

/s/ By DON S. WILLNER,

Of Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

MINUTE ORDER OF THE COURT

Now at this day It Is Ordered that the motion of the defendant to dismiss the complaint filed herein be, and is hereby denied.

February 11, 1955.

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing upon defendant's motion to dismiss and the Court having considered the memoranda submitted by the parties and being fully advised in the premises,

It Is Hereby Ordered, that defendant's motion to dismiss should be and hereby is denied.

Dated this 17th day of February, 1955.

/s/ GUS J. SOLOMON,
District Judge

[Endorsed]: Filed February 17, 1955.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on for pre-trial conference on the 31st day of May, 1955. The plaintiff appeared by one of his attorneys, Don S. Willner, and the defendant by one of his attorneys, Harry Harris. The parties with the approval of the Court agreed upon the following:

I.

Plaintiff is a citizen, resident, and inhabitant of the State of Washington and defendant is a citizen, resident, and inhabitant of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

That on May 29, 1951, plaintiff and defendant purchased all of the stock of Highway Freight, Inc., an Oregon corporation, engaged in the business of a motor carrier for hire.

III.

That 49 $\frac{1}{2}$ shares of stock of said corporation were issued to plaintiff and 49 $\frac{1}{2}$ shares of stock of said corporation were issued to defendant and one share of stock of said corporation was issued to Earle V. White, Jr., who had no beneficial interest in said corporation.

IV.

That at a special meeting of the stockholders of said corporation upon May 29, 1951, plaintiff and defendant and Earle V. White, Jr. were duly elected directors of said corporation.

V.

That at a meeting of the Board of Directors of said corporation on May 29, 1951, defendant was duly elected president-treasurer of said corporation with the duties of general manager and with the full-time care of the general business matters of the corporation; and did so act at all times from May 29, 1951, until July 20, 1954.

VI.

That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as part of the sale, the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation.

VII.

That during the period defendant was president-

treasurer and general manager of the corporation 10% per month penalties accumulated on unpaid Oregon State highway taxes whereby constantly putting the corporation's Oregon Public Utilities Commission permit in constant jeopardy; that State of Washington Excise taxes, Federal Withholding taxes, State of Oregon withholding taxes, Federal Old Age Benefit Taxes, Federal Excise taxes, Federal Transportation taxes, and State of Oregon unemployment taxes accumulated unpaid. That a judgment in favor of Butler's Tire & Battery Co., Inc. was for a period unpaid which resulted in a Highway Freight, Inc. rig being executed on and kept off the road and out of productive use for at least a week. That current accounts receivable were turned over by defendant to employees to pay their own salaries.

VIII.

That on or about July 20, 1954, plaintiff made, executed, and delivered to defendant his promissory note in writing in words and figures as follows, to-wit:

\$3,000.00

Portland, Oregon, July 20, 1954

For Value Received, I promise to pay to the order of Clarence V. Watson, at Portland, Oregon, Three Thousand (\$3,000.00) Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of Five (5) Per Cent per annum, from date until paid, payable in monthly installments, at the dates and in the amounts as follows:

One hundred (\$100.00) Dollars per month, which includes principal and interest, on or before the 20th day of July, 1954, and a like amount on or before the 20th day of each succeeding calendar month thereafter until both principal and interest have been paid;

Such monthly payments conditioned upon the maker receiving on or before the 15th day of the same month the above payments fall due, not less than Seven Hundred Fifty (\$750.00) Dollars from Messrs. Okey Hamrick and Gilbert Kaer as their monthly payments on a contract of July 2, 1954, for the purchase of the stock of Highway Freight, Inc.; and in the event of the failure of the maker hereof to receive said monthly payment as due from Messrs. Kaer and Hamrick, the aforesaid payment of \$100.00 per month due under this note will be delayed until such payment has been received from Messrs. Kaer and Hamrick, or one of them.

Therefore, if under the above conditions, said installments are not so paid, it is understood that the whole sum of both principal and interest do not become immediately due and collectible at the holder's option; but only become due and payable and collectible by the holder at his option in the event that the maker hereof has received the aforesaid monthly payment of not less than \$750.00 from Messrs. Kaer and Hamrick, and failed to make the payment of \$100.00 per month specified above. In case suit or action is instituted to collect this note or any portion thereof, I promise to pay such rea-

reasonable sum as the Court may adjudge to be reasonable attorney fees in such suit or action.

/s/ W. C. Button

Woodrow C. Button

That plaintiff has received on or before the 15th day of the month when the above payments fall due his payments from Messrs. Kaer and Hamrick, as provided for in said note, and that defendant has made demand upon the plaintiff for the payment of said note and the same has been refused.

X.

Plaintiff and Defendant are now jointly responsible for the liabilities of said corporation incurred previous to July 20, 1954.

Plaintiff's Contentions

Plaintiff makes the following contentions applicable to each of the three causes of suit:

I.

That defendant in the full time conduct of the general business matters of said corporation owed a fiduciary duty to plaintiff.

II.

That plaintiff believes that an accounting would reveal numerous instances of misappropriation, mismanagement, and diversion of corporate opportunities by the defendant other than those specifically alleged, and plaintiff does not know the exact amount of money by which the defendant damaged

plaintiff through these instances, but plaintiff believes it would be in excess of \$5,000.00 in each case.

III.

That Plaintiff discovered the facts hereinbefore alleged after July 20, 1954, through investigation.

IV.

That plaintiff and defendant are jointly responsible for the liabilities of Highway Freight, Inc., incurred previous to July 20, 1954, in the amount of approximately \$65,000.00, and plaintiff contends that these liabilities are due to the misappropriation, mismanagement and diversion of corporate opportunities of the defendant.

V.

That plaintiff has no speedy or adequate remedy at law.

VI.

That the three causes of suit alleged in plaintiff's contentions do not accrue to the benefit of the present owners of Highway Freight, Inc. and the present owners have not been damaged by the actions of the defendants in the alleged three causes of suit. For his first cause of suit plaintiff contends as follows:

That defendant during the period May 29, 1951 until July 20, 1954, misappropriated the funds of said corporation. That some of the instances of said misappropriation are as follows:

During the period December 1, 1953 through June 15, 1954, there was \$183.75 cash recorded as received by Highway Freight, Inc., but not deposited in the bank account of the corporation. The dates, amounts and payors are as follows:

January 20, 1954, \$30.00, A. E. Lehman.

February 1, 1954, \$5.00, Les Boyd.

March 20, 1954, \$50.00, L. M. Boyd.

April 5, 1954, \$23.75, Unknown.

April 15, 1954, \$75.00, Portland Equipment Co.

Total, \$183.75.

During the period December 1, 1953, through June 15, 1954, there were checks in the amount of \$2,990.32 recorded as received by Highway Freight, Inc., but not deposited. The dates and amounts and payors of these checks are as follows:

December 18, 1953, \$192.85, Park Loading Company.

February 23, 1954, \$157.03, Park Lumber Co.

March 2, 1954, \$297.19, Park Lumber Co.

March 23, 1954, \$28.43, A. Fisher.

March 16, 1954, \$398.74, Park Lumber Co.

March 11, 1954, \$95.35, Granning and Treece.

April 11, 1954, \$43.03, Jack Harbert.

April 12, 1954, \$72.50, Parks Lumber Co.

April 7, 1954, \$117.44, Granning and Treece.

May 18, 1954, \$50.00, Tom Dunbar.

June 3, 1954, \$110.00, Tom Dunbar.

June 7, 1954, \$102.38, Tom Dunbar.

March 3, 1954, \$70.04, H. R. Lee.
April 30, 1954, \$387.28, Park Lumber Co.
May 21, 1954, \$166.78, Lighthall and M. D. Knapp.
June 7, 1954, \$422.27, D. Knapp.
June 7, 1954, \$107.72, M & N Logging Co.
June, \$171.39, Composition Unknown.
Total, \$2,990.32.

These checks were marked in the books as being taken by defendant, although there is no record of such amounts in the drawing account of the defendant.

For his second cause of suit plaintiff contends as follows:

That defendant during the period May 29, 1951, until July 20, 1954, mismanaged the affairs of Highway Freight, Inc. That permitting unpaid taxes to accumulate as set forth in Paragraph VIII of Agreed Facts is mismanagement. That allowing a judgment in favor of Butlers Tire and Battery Co., Inc., to remain unpaid for a period which resulted in a Highway Freight, Inc. rig being executed on and kept off the road and out of productive use for at least a week is mismanagement. That turning current accounts receivable over to employees to pay their own salaries is mismanagement. That an instance of mismanagement was losing valuable and lucrative interchange rights with Okey's Trucking of Woodland, Washington, due to refusal to pay to Okey's Trucking its share of interchange business, refusal to keep proper books on interchange busi-

ness and accepting of payments in the name of Highway Freight that should have been in the name of Okey's Trucking.

For his third cause of suit plaintiff contends as follows:

That defendant during the period May 29, 1951, until July 20, 1954, diverted corporate opportunities of Highway Freight, Inc. away from the corporation and to himself. That some of the instances of said diversion of corporate opportunities are as follows:

That for almost two years up to July 20, 1954, defendant personally has done motor carrier hauling for Park Lumber Co. of Estacada, Oregon. That said hauling has often been done with Highway Freight, Inc. vehicles and other equipment. That defendant has informed plaintiff and plaintiff therefore believes that defendant has cancelled an account receivable of Highway Freight, Inc. in return for a certain Diamond Tractor; that, thereafter, for many months previous to July 20, 1954, defendant proceeded to use said Diamond T Tractor for hauling, using other Highway Freight equipment and personnel to service said Diamond T Tractor and taking as his personal money all of the revenues obtained through the use of said Diamond T Tractor.

Defendant's Contentions

For answer to plaintiff's contentions, defendant denies each and every matter and thing therein

contained and the whole thereof, except as expressly admitted, modified or qualified hereinafter or in the agreed set of facts.

I.

Answering to plaintiff's first cause set forth in plaintiff's contentions, defendant denies misappropriating any funds belonging to Highway Freight, Inc., and contends that those items set forth in said cause as being misappropriated by defendant consist of expenditures made by defendant in payment of corporate obligations including the sum of \$937.79, applied by defendant on his delinquent salary account in the amount of \$3,214.49, and these items are clearly shown as being charged against defendant in the Books and Records of the corporation.

II.

Answering to plaintiff's second cause set forth in plaintiff's contentions, defendant denies any mismanagement of Highway Freight, Inc., and contends that those items therein set forth as being mismanagement on the part of defendant were the result of adverse economic conditions and inequitable acts of the plaintiff.

III.

Answering to plaintiff's third cause set forth in plaintiff's contentions, defendant denies diverting any corporate opportunities, and contends that the Diamond Tractor referred to therein was used only when corporate equipment was not available, and

used as an aid to the corporation's business, and that defendant credited his salary account for a portion of the purchase price of said tractor, cancelling an account receivable owed by the seller thereof in equal amount, and such is clearly reflected in the Books and Records of the corporation.

For defendant's first separate and distinct affirmative defense, defendant contends, as a separate instance to each of plaintiff's three causes, that plaintiff's contentions are insufficient to state a claim upon which relief can be granted to plaintiff.

For defendant's second separate and distinct affirmative defense, defendant contends that plaintiff committed inequitable acts in respect to defendant and the corporation, proximately causing the matters complained of in plaintiff's three causes of suit, and plaintiff can not now be heard to complain of defendant.

For defendant's third separate and distinct affirmative defense by way of counterclaim, defendant contends that defendant should have judgment of plaintiff in the amount of \$3,000.00 with interest at the rate of 5 per cent per annum from the 20th day of July, 1954 until paid, on the promissory note set forth in Paragraph VIII of the agreed set of facts, together with the sum of \$450.00 reasonable attorney's fees for the collection thereof.

Plaintiff's Reply Contentions

I.

Denies each and every matter and thing therein

contained and the whole thereof except as is expressly admitted or qualified in plaintiff's contentions herein.

II.

That plaintiff signed the promissory note set forth in defendant's counterclaim due to the fraudulent misrepresentation of the defendant in that plaintiff would not have signed this note but for the defendant's concealing the facts that he had misappropriated the money of Highway Freight, Inc., mismanaged its affairs and diverted its corporate opportunities to himself, all as alleged in plaintiff's complaint.

III.

That at the time plaintiff signed said note, he did not have knowledge of defendant's misappropriation, mismanagement and diversion of corporate opportunities.

IV.

That plaintiff signed this note in reliance on the fraudulent concealment and misrepresentations of the defendant.

V.

That plaintiff had a right to rely on the misrepresentation and fraudulent concealment of the defendant since defendant was the president of the company and in general charge of all its business matters, and was in charge of all books and records of said corporation.

VI.

That as a direct and proximate result of the misrepresentation of the defendant, plaintiff has been

injured in the sum of \$3,000.00 the value of said promissory note.

VII.

Denies that \$450.00 or any other sum is a reasonable sum to be allowed defendant as attorney's fees for the collection of said note.

Issues of Fact

I.

During the period May 29, 1951 until July 20, 1954, did defendant misappropriate funds of said corporation?

II.

During the period May 29, 1951 until July 20, 1954, did defendant mismanage the affairs of said corporation?

III.

During the period May 29, 1951, until July 20, 1954, did defendant divert corporate opportunities away from said corporation to himself?

IV.

Did plaintiff discover the facts of said alleged misappropriation, mismanagement and diversion of corporate opportunities through investigation after July 20, 1954?

Issues of Law

I.

Did defendant in the full time conduct of the general business matters of said corporation owe a fiduciary duty to plaintiff?

II.

Should defendant be ordered to account for all sums, if any, due to plaintiff on account of defendant's alleged misappropriation of funds of said corporation?

III.

Should defendant be ordered to account for all sums, if any, due to plaintiff on account of defendant's alleged mismanagement of said corporation?

IV.

Should defendant be ordered to account for all sums, if any, due to plaintiff on account of defendant's alleged diversion of corporate opportunities of said corporation to himself.

V.

Should plaintiff have judgment for such amounts as may be found as due plaintiff from defendant?

VI.

Are the facts alleged in plaintiff's complaint sufficient to state a claim upon which relief can be granted to plaintiff?

VII.

During the time that defendant was manager of said corporation, did plaintiff act inequitably in respect to defendant and said corporation so that plaintiff cannot be heard to complain of defendant?

VIII.

Should defendant be given judgment on his counterclaim?

IX.

Should said promissory note be cancelled on the grounds of fraud?

X.

In the event defendant be given judgment on his counterclaim is \$450.00 or any other sum a reasonable sum to be allowed defendant as attorney fees for the collection of said note?

Plaintiff's Exhibits

1. General Ledger of Highway Freight, Inc.
2. Book of Journals of Highway Freight, Inc.
3. Cash Receipts — Sales Journals, Highway Freight, Inc.
4. Daily cash book of Highway Freight, Inc.
5. Mileage analysis sheets of Highway Freight, Inc.
6. Note signed by Clarence V. Watson and introduced in deposition.
7. Checkbook and Bank Statements of Clarence V. Watson introduced in deposition.
8. Transfer of title receipt from Secretary of State for Diamond T introduced in deposition.
9. Checks from Parks Lumber Company to Clarence V. Watson introduced in deposition.
10. Checks from Granning & Treece Company to Highway Freight Co., Inc. introduced in deposition.
11. Checks from Clarence V. Watson to I. W. Sterns introduced in deposition.

12. Promissory Note executed by purchasers of Highway Freight Company, Inc.

13. Conditional Sales Contract covering Diamond T Truck.

14. Power of Attorney—Watson to Button.

Defendant's Exhibits

1. Agreement dated July 20, 1954, between sellers and purchasers of said corporation.

2. Supplementary Contract dated July 20, 1954.

3. Bill of Sale dated July 20, 1954.

4. Promissory Note dated July 20, 1954.

5. Collateral agreement dated July 20, 1954.

It Is Hereby Ordered that the foregoing pre-trial order shall be amended, if necessary, if either party desires to introduce further exhibits, and that the said pre-trial order supersedes the pleadings filed herein.

Dated this 24 day of June, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved by:

/s/ DON S. WILLNER,
Of Attorneys for Plaintiff

/s/ HARRY A. HARRIS,
Of Attorneys for Defendant

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial before the Honorable Claude McColloch, Judge of the above entitled Court on Wednesday, September 7, 1955, plaintiff appearing in person and by his attorneys, Crawford & Willner, Wm. J. Crawford and Don S. Willner, and defendant appearing in person and by his attorneys, Stanley J. Mitchell and Harry A. Harris; thereupon evidence was introduced, and after both parties had rested, arguments were made by counsel for the respective parties and the matter was thereupon submitted to the Court. After considering said oral arguments and all evidence of the case and the memoranda previously submitted by the parties and the Court being fully advised in the premises now enters the following

Findings of Fact

I.

Plaintiff is a citizen, resident and inhabitant of the State of Washington and defendant is a citizen, resident and inhabitant of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

That on May 29, 1951, plaintiff and defendant purchased all of the stock of Highway Freight, Inc.,

an Oregon corporation engaged in the business of a motor carrier for hire.

III.

That 49½ shares of stock of said corporation were issued to plaintiff and 49½ shares of stock of said corporation were issued to defendant and one share of stock of said corporation was issued to Earle V. White, Jr. who had no beneficial interest in said corporation.

IV.

That at a special meeting of the stockholders of said corporation on May 29, 1951, plaintiff and defendant and Earle V. White, Jr. were duly elected directors of said corporation.

V.

That at a meeting of the Board of Directors of said corporation on May 29, 1951, defendant was duly elected president-treasurer of said corporation with the duties of general manager and with the full-time care of the general business matters of the corporation and did so act at all times from May 29, 1951, until July 20, 1954.

VI.

That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as a part of the sale the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation.

VII.

That defendant during the period May 29, 1951, to July 20, 1954, misappropriated \$13,945.98 from said corporation. That said amount is composed of the following:

(a) \$3,866.25—cash items and checks in records, but not deposited.

(b) \$403.67—customer's checks not in books.

(c) \$2,229.81—non-duplicated deposits in defendant's private bank account.

(d) \$1,100.00—deposits in defendant's private bank account after June 15, 1954, for prior hauling.

(e) \$690.00—California State Board of Equalization performance bond refund.

(f) \$696.66—McCracken receivable.

(g) \$550.00—Sleeper cab receivables.

(h) \$327.54—mileage shrinkage of May 6, 1954.

(i) \$2,450.96—Diamond T operation expense.

(j) \$1,631.09—Kirkpatrick, Scott Lumber and M & M Plywood receivables.

VIII.

That the present owners of Highway Freight, Inc. are not entitled to receive the sums listed in Findings VII and VIII above and the present owners of Highway Freight, Inc. have not been damaged by the misappropriation and mismanagement of defendant.

IX.

That plaintiff through investigation discovered

the misappropriation and mismanagement listed in Finding VII above after July 20, 1954.

X.

That plaintiff and defendant are now jointly responsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, which exceed \$68,000.00.

XI.

That on or about July 20, 1954, plaintiff made, executed and delivered to defendant his promissory note in the amount of \$3,000.00; that plaintiff signed said promissory note due to the fraudulent misrepresentations of defendant; that at the time plaintiff signed said note he did not have knowledge of defendant's misappropriation and mismanagement; that plaintiff signed said note in reliance on the fraudulent misrepresentations of the defendant upon which plaintiff had a right to rely.

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following

Conclusions of Law

I.

Defendant in the full-time conduct of the general business matters of Highway Freight, Inc. owed a fiduciary duty to plaintiff.

II.

The facts alleged in plaintiff's complaint are suf-

ficient to state a claim upon which relief can be granted to plaintiff.

III.

During the time that defendant was manager of Highway Freight, Inc. plaintiff did not act inequitably in respect to defendant and said corporation.

IV.

Plaintiff should be given judgment against the defendant in the amount of \$13,945.98 for misappropriation.

V.

Plaintiff should have judgment against defendant on defendant's counterclaim.

VI.

The promissory note given to defendant by plaintiff on July 20, 1954, should be cancelled for fraud.

Dated this 23rd day of September, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge

Certificate of Sevice attached.

[Endorsed]: Filed September 23, 1955.

In the District Court of the United States for the
District of Oregon

No. Civil 7686

WOODROW C. BUTTON, Plaintiff,

vs.

CLARENCE V. WATSON, Defendant.

JUDGMENT

This matter having come on for trial before the Honorable Claude McColloch, Judge of the above entitled Court on Wednesday, September 7, 1955, plaintiff appearing in person and by his attorneys, Crawford & Willner, Wm. J. Crawford and Don S. Willner and defendant appearing in person and by his attorneys, Stanley J. Mitchell and Harry A. Harris; thereupon evidence was introduced and after both parties had rested arguments were made by counsel for the respective parties and the matter was thereupon submitted to the Court. After considering said oral arguments and all evidence of the case and the memoranda previously submitted by the parties and the Court having heretofore entered its findings of facts and conclusions of law, and the Court being fully advised in the premises,

Now, Therefore, based upon said findings of facts and conclusions of law:

It Is Hereby Ordered, Adjudged and Decreed:

1. Plaintiff is hereby given judgment against the

defendant in the sum of \$13,945.98 on his first cause of suit.

2. Plaintiff is hereby given judgment against defendant upon defendant's counterclaim.

3. The promissory note from plaintiff to defendant signed on July 20, 1954, is hereby cancelled because of the fraud of the defendant.

4. Plaintiff is hereby given judgment against defendant in the amount of his costs and disbursements herein which are taxed at \$438.66.

5. Execution shall issue for the above amounts.

Dated this 23rd day of September, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge

[Endorsed]: Filed September 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Woodrow C. Button, the above named plaintiff,
and Crawford and Willner, his attorneys:

You and Each of You, Will please take notice that the above named defendant, Clarence V. Watson, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment, and each and every part and the whole thereof, made and entered in the above entitled Court and cause on the 23rd day of September, 1955, providing as follows: (omitting recital)

“1. Plaintiff is hereby given judgment against the defendant in the sum of \$13,945.98 on his first cause of suit.

2. Plaintiff is hereby given judgment against defendant upon defendant's counterclaim.

3. The promissory note from plaintiff to defendant signed on July 20, 1954, is hereby cancelled because of the fraud of the defendant.

4. Plaintiff is hereby given judgment against defendant in the amount of his costs and disbursements herein which are taxed at \$438.66.

5. Execution shall issue for the above amounts.”

/s/ Claude McCulloch

/s/ HARRY A. HARRIS,

Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR PAYMENT OF COSTS ON APPEAL

Whereas, Clarence V. Watson, defendant in the above entitled Court and cause, appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment heretofore, to-wit: on the 23rd day of September, 1955, rendered and entered in the above entitled Court and cause and in favor of the plaintiff, Woodrow C. Button, and

against the defendant, Clarence V. Watson, and Notice of said Appeal being filed simultaneously herewith.

Now, Therefore, In consideration of the premises and of such appeal we, Clarence V. Watson, as Principal, and General Casualty Company of America, a corporation, organized and existing under the laws of the State of Washington, and duly authorized to transact a surety business in the State of Oregon, as Surety, do hereby jointly and severally undertake and promise to pay to Woodrow C. Button, and are firmly bound unto him for the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this Bond is such that upon appeal the defendant shall pay all costs adjudged against him if said appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this Bond shall be void, but if the defendant fails to perform this condition, then in that event, payment of the amount of this Bond shall be due forthwith.

In Witness Whereof, The said Principal has caused these presents to be signed and executed, and the said Surety has caused these presents to be duly executed by its authorized officers, and its corporate seal to be hereunto affixed this 21st day of October, 1955.

/s/ CLARENCE V. WATSON

[Seal] GENERAL CASUALTY COMPANY
OF AMERICA,

/s/ By J. J. HAHN,
Attorney-in-Fact

Countersigned at this 21st day of October, 1955,

/s/ By DWIGHT CATHERWOOD,
Resident Agent

Acknowledgment of Service attached.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant intends to rely upon the following, and will contend that the United States District Court erred in the following respects:

1. In denying defendant's Motion to Dismiss;
2. In giving judgment for plaintiff upon defendant's counter-claim, and not giving defendant judgment thereon.

/s/ HARRY A. HARRIS,
Of Attorneys for Defendant-
Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District

Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Notice of motion to dismiss; Minute order reserving decision on motion; Answer; Reply; Minute order denying motion to dismiss; Order denying motion to dismiss; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Undertaking for payment of costs on appeal; Notice of cross-appeal; Undertaking for payment of costs on cross-appeal; Statement of points on appeal; Designation of contents of record on appeal; Additional designation of contents of record on appeal; Order to forward exhibits to Court of Appeals and Transcript of docket entries; constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7686, in which Clarence V. Watson is the defendant and appellant and Woodrow C. Button is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of the appellant and appellee, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00 and the cost of filing the notice of cross-appeal, \$5.00 have been paid by the appellant and the appellee.

I further certify that the exhibits will be forwarded by express at a later date.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 14th day of November, 1955.

[Seal] R. DeMOTT, Clerk

/s/ By F. L. BUCK, Chief Deputy

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS
(Partial)

Portland, Oregon, September 6, 1955

Before: Honorable Claude McColloch, Chief Judge.

* * * * *

WOODROW C. BUTTON

the plaintiff in the above entitled cause, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

* * * * *

Cross Examination

Q. (By Mr. Harris): Now I believe you stated that at that time Mr. Watson also, in order to consummate the deal, sold a truck that he owned to Kaer and Hamrick, did he not, or did he sell that truck to you?

A. No, he sold the truck to me.

Q. And you gave him a note, did you, for it?

A. I did.

Q. What was the principal amount of the note, do you recall? A. \$3,000.

* * * * *

Q. You stated in your contentions here that you were defrauded into buying this truck that Clarence Watson sold to you that you gave a note for. Now was the truck worth the money?

A. Are you referring to the Diamond T?

Q. Yes, the Diamond T that was sold as part of the deal.

A. I assume it was worth the money on the basis that Kaer and Hamrick, the purchasers, were willing to pay the same price for it to Clarence.

Q. In other words, there is no question of any misrepresentation as to the condition of the truck, or anything of that sort?

A. Not as far as I know.

* * * * *

[Endorsed]: Filed November 29, 1955.

[Endorsed]: No. 14973. United States Court of Appeals for the Ninth Circuit. Clarence V. Watson, Appellant, vs. Woodrow C. Button, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 13, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.